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ADMINISTRATIVE LAW

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During the term, the Supreme Court was presented with another facet of the *Boucher* litigation,[1] the purpose of which has been to establish as illegal the removal of Boucher and his colleagues from their posts in the State Division of Employment Security and to recover back pay. In the initial appeal[2] in 1954 the court ruled that the employees had been illegally removed from their positions since they had not been given advance written notice of such removal as required by Civil Service Commission Rule XII, Section 2. Thereafter a second attempt to remove Boucher and the others was made by the Administrator of the Division. The legality of this second attempt to remove was promptly appealed to the Civil Service Commission. While such appeal was pending, Boucher and his colleagues brought mandamus proceedings in a district court seeking an order compelling payment of back wages during the period between the first illegal removal and the second removal pending before the Commission. The Commission took the position, in the proceedings in the district court, that the issue of back pay was pending before it as part of the appeal from the second dismissal and hence that a mandamus proceeding against the administrator was improper. This suit was dismissed, but dismissal was reversed by the Supreme Court and the suit reinstated as proper.[3] After a trial on the merits, mandamus was ordered to issue and the Commission appealed. For the second time (first on the appeal from dismissal of the mandamus suit on exceptions and again on appeal from the judgment mandamusing payment) the court rejected the Commission's plea of *lis pendens*, holding that the matter before the Commission (illegality of the second dismissal) did not involve the issue of back pay. This conclusion was reached by the court by limiting the exercise of Commission jurisdiction to order back pay, under Article 14, Section 15(0)(3) of the Constitution, to those instances where there has been a lawful

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1. State *ex rel.* Boucher v. Heard, 232 La. 499, 94 So.2d 451 (1957).

2. Boucher v. Division of Employment Security of the Department of Labor, 226 La. 227, 75 So.2d 343 (1954).

dismissal (preceded by proper advance notice) but where the "cause" on which dismissal rests has not been sustained on appeal before the Commission. Since only the legality of the second dismissal was under attack before the Commission and since the first dismissal had been held illegal by the court, mandamus was deemed proper to compel payment of wages for the interim period. This seems clear enough since, failing a lawful dismissal, the employees continued on the payroll until legally dismissed; while contesting the legality of the second dismissal, they asked for back pay only up to the time of the second dismissal.

To buttress the contention that the back pay issue was still before the Commission, counsel argued further on the appeal that the first dismissal was actually valid since Rule XII went beyond the constitutional authority in requiring advance notice in writing. This contention afforded the court a second opportunity to point out that the Commission has full rule-making power and that, in exercising it so as to require advance notice in writing of removals, it did not exceed its powers. Since the court has consistently upheld the Commission rule with respect to this requirement,[4] it is obvious that it also found the rule had a "rational basis" in that it represented an attempt to assure freedom from arbitrary action in the area of employee removal.

In the case of *Day v. Department of Institutions*,[5] plaintiff Day also emerged from lengthy litigation before the Civil Service Commission and the Supreme Court with an order awarding her back pay as well as reinstating her in her former position.

Plaintiff Day was before the court at the 1955 term on appeal from the Civil Service Commission on the ground that her appeal to the Commission had been improperly dismissed as being untimely filed.[6] She was a clerk in the Department of Institutions and an elected member of the East Baton Rouge Democratic Committee when an amendment to the Civil Service law classified her position with the state, effective July 1, 1953, and rendered it subject to the requirement that she not also hold elective office. In August 1953 she took leave of absence from her state job and while on such leave was informed of the Civil Service proscription against holding an elective position. She was al-

3. State *ex rel.* Boucher v. Heard, 228 La. 1078, 84 So.2d 827 (1956).
4. Day v. Department of Institutions, 228 La. 105, 81 So.2d 826 (1955); 231 La. 775, 93 So.2d 1 (1957); Young v. Charity Hospital, 226 La. 708, 77 So.2d 13 (1954).
5. 231 La. 775, 93 So.2d 1 (1957).
6. 228 La. 105, 81 So.2d 826 (1955).

leged to have resigned orally, effective September 1, 1953, from her classified position. Thereafter, the Department of Institutions notified Civil Service of the resignation and her name was removed from the payroll. Some two months later, in a conference with the Director of the Department, she denied having resigned and indicated her readiness to return to work. Failing in this move, she restated her position through counsel in January 1954 and in reply the Director stated that since her resignation the duties of her position had been merged with another and that he did not propose to create a new position for her.

Within sixty days of this letter but some five months after removal from the payroll, she filed her appeal with the Civil Service Commission; the appeal was dismissed as untimely filed. On her appeal to the Supreme Court, it was urged that the constitutional requirement of notification in writing of "cause" was applicable to cases where an oral resignation was later disputed, as well as to clear cases of demotion, dismissal, or discrimination. Rule XII, enacted by the Commissioner thereunder, was deemed applicable as was Rule 13.2.[7] In Rule XII the Commission had provided that "in every case of removal . . . the appointing authority or his authorized agent shall furnish the employee and the Director in advance of such action a statement in writing giving explicit and detailed reasons therefor and shall notify such employee of his right of appeal to the . . . Commission." In Rule 13.2 an employee was given thirty days from the date of an alleged act of discrimination to apply for a Commission hearing. Interpreting the two rules together, the written statement required in Rule XII was deemed by the court, in effect, to constitute the alleged act of discrimination and the date of furnishing it the date from which the thirty-day period would run. Since no such statement had been furnished to plaintiff Day, the court found her right to appeal to the Commission never had prescribed.[8] The case was therefore remanded to the Commission with directions to hear the appeal.

On remand, the Commission nonetheless regarded as still open the question of whether plaintiff Day had been legally removed from the payroll and found the Director's letter of January 27, 1954, a sufficient statement in writing, coupled with the oral resignation, to support the removal as of September 1, 1953. Plaintiff Day's interviews with the Director in the interim be-

7. Louisiana Civil Service Rules 48, Rule XII, 13.2 (1954).
8. 228 La. 105, 115, 81 So.2d 826, 828.

tween September 1, 1953, and January 27, 1954, were found by the Commission to constitute "solicitations of re-employment" rather than a "termination of her leave without pay"; hence no back pay was deemed payable.

The present decision is on the appeal from that Civil Service determination.[9] The court, after reversing itself on rehearing, held that the Commission had not followed the law of the case as laid down on the previous appeal; that "law" was stated to be that plaintiff Day had not been legally removed since she had not been furnished with a statement in writing acknowledging her resignation prior to her removal. This holding, said the court, should have on remand governed both the procedural matter of hearing the appeal by the Commission and the substantive issue on the merits of her right to reinstatement and back pay. The finding of fact that plaintiff had not terminated her leave without pay was reversed on the ground that, although a finding of fact, it was arbitrary and capricious and hence subject to being judicially set aside.[10] Plaintiff was ordered reinstated on the payroll until such time as she should be legally removed therefrom and awarded back pay from September 1, 1953.

The case of *Fields v. Rapides Parish*[11] involved an alleged dismissal of a public school teacher with some twenty-five years of service and with permanent status under the Teacher Tenure Act.[12] In the fall of 1946, plaintiff Fields did not appear for duty because of illness and belatedly (one month after school had opened) requested an emergency leave of absence for the school term. (She was then in California and remained there for the purpose of receiving medical treatment.) She received no reply from her superintendent with respect to her requested leave. In August 1947 she returned to Louisiana and informed her superintendent that she was able to resume her duties; at this time she was told that she had never been granted a leave of absence and that her failure to report for work in September 1946 constituted desertion of her job, leaving her without claim to a position in the Rapides Parish School System. No hearing was accorded Mrs. Fields by the Board on the alleged ground that she had abandoned her employment and was therefore not within the protection of the Teacher Tenure Act[13] requiring the filing of

9. 231 La. 775, 93 So.2d 1 (1957).
10. *Id.* at 802, 93 So.2d at 6, 11.
11. 231 La. 914, 93 So.2d 214 (1957).
12. La. R.S. 17:441-444 (1950).
13. *Id.* at 17:443.

written charges against her and the holding of a hearing prior to a decision removing her from her position.

After amicable demands for reinstatement and back pay had been unavailing, plaintiff resorted to suit; her first two suits filed were dismissed on exceptions; the third was decided on the merits, the trial judge rendering judgment in her favor for some $14,700.00 in back pay and ordering her reinstatement to her former position.

Before deciding the case on the merits the trial judge overruled two exceptions filed by the Board, one an exception of no cause of action, alleging that she had been properly dismissed, the second an exception of no right of action on the ground that the husband, who had been substituted as plaintiff for the wife on the theory that the rule of *Houghton v. Hall*[14] and *Succession of Howell*[15] required it, had no interest in his wife's rights under the Teacher Tenure Act. On appeal, the judgment was annulled on the ground that this latter exception should have been sustained by the trial judge. To reach this result, it was necessary for the Supreme Court to overrule a decision of the First Circuit Court of Appeal applying *Houghton v. Hall* and *Succession of Howell* in a similar Teacher Tenure case and by which the trial judge had deemed himself bound.[16]

Plaintiff Fields then filed her fourth suit, which is the basis of the present appeal. In this suit a plea of laches, which had been overruled in the third suit, was again advanced by the Board, the contention being that plaintiff Fields had delayed unreasonably in filing her third suit; no appeals had been taken from dismissal on exceptions of either the first or second suit and the third suit had been brought two years and eight months after such dismissals. The judge trying the fourth suit sustained the plea of laches and dismissed. This plea had also been urged on the appeal of the third suit but was not passed on by the Supreme Court since the judgment was deemed null on the basis of failure to sustain the exception of no right of action;[17] on this appeal, plaintiff argued that the doctrine of laches was not applicable since the statute provided her with a year from the date of a Board finding that she had been guilty of wilful neglect, incompetency, or dishonesty within which to appeal to a court of

14. 177 La. 237, 148 So. 37 (1933).
15. 177 La. 276, 148 So. 48 (1933).
16. Riche v. Ascension Parish School Board, 200 So. 681 (La. App. 1941).
17. 227 La. 290, 293, 79 So.2d 312, 315 (1955).

competent jurisdiction for review of the Board finding.[18] Plaintiff argued that the doctrine of laches had thus been rendered inapplicable to suits for reinstatment under the Teacher Tenure Act and in effect that her right of action would not prescribe until she had a hearing before the Board and one year had elapsed thereafter without application for court review. The court found "nothing in the . . . statutes indicating an intention of the legislature to abolish the equitable doctrine of laches" and affirmed the judgment of dismissal.[19]

Against the background of the *Fields* decision, the interpretations given to the constitutional provision and Civil Service Commission rules in the *Day* and *Boucher* cases[20] will no doubt engender very considerable interest among members of the teaching profession interested in safeguarding their notice and hearing rights under the Teacher Tenure Act. An interpretation such as was given the Commission's Rule XII and 13.2, which made the furnishing of a written statement the basis for starting the thirty-day appeal period running,[21] seems an equally necessary interpretation with respect to the Teacher Tenure Statute's requirement of notice and hearing as starting the one-year period within which a petition in court may be filed.

The decision in the first *Day* appeal, in which this interpretion was adopted by the court, was not argued in the *Fields* case. Had it been, the court might then have had the task of reconciling its holding there that a statement of charges was sacramental to starting prescription running in removing a Civil Service employee with tenure, with its holding in the *Fields* case that the doctrine of laches overrode a failure to give notice and hearing under the Teacher Tenure Act. There was of course no need to consider laches in the *Day* case since the delay was not serious and the position in contest had simply been abolished.[22] In *Fields*, however, reconciliation might have become necessary had the *Day* case been argued strongly. As it was, in the *Fields* case the court could content itself, in applying the doctrine of laches, with noting that plaintiff Fields "slept on her rights" while she "well knew of her complete and final discharge"

18. La. R.S. 17:443 (1950).
19. 231 La. 914, 917, 93 So.2d 214, 216 (1957).
20. Day v. Department of Institutions, 228 La. 105, 81 So.2d 826 (1955); 231 La. 775, 93 So.2d 1 (1957); State *ex rel.* Boucher v. Heard, 232 La. 499, 94 So.2d 451 (1957).
21. Day v. Department of Institutions, 228 La. 105, 81 So.2d 826 (1955).
22. See page 81 *supra*.

through various informal communications and through an answer filed in her law suit.[23] This hardly seems the notice and hearing contemplated in a tenure statute designed to safeguard teachers against arbitrary school board action.

In *Cottingham v. Department of Revenue*[24] the court had occasion again to apply to a Civil Service Commission finding of fact the principle that "where the decision is based on substantial evidence the court may not consider the weight or sufficiency of the evidence" and to point out that "the burden of proving arbitrary action in the discharge of the employee is on the employee."[25]

The court refused to disturb the Commission's inferences of unreliability and untrustworthiness drawn from an incorrect answer given to an application inquiry as to whether applicant had ever been arrested or convicted. The applicant had answered "No" to the inquiry, either negligently or unintentionally, when in fact he had been arrested and convicted of violating the Sunday Closing Law. The applicant had been removed from his position, in part on the basis of this incident.

Had the issue been one of law, or, as the court phrased it, had there been "no real and substantial relation between the assigned cause for the dismissal of appellant and his qualifications for the position in which he served," the court stated that it would have annulled the administrative action as arbitrary.[26] Thus, whether the criterion used by the agency as cause for dismissal has a rational basis in the legislative objects and purposes in creating the agency will be a matter of full review for the court, even though initially formulated by the agency. The decision seems in keeping with the limited scope of review sought for commission action in making their judgment final on the facts with appeal only on "any question of law."

Likewise, in *Jordan v. New Orleans Police Department*[27] the court refused to disturb an administrative finding of fact. The record contained facts tending to support either of two hypotheses: (1) that the police officer disciplined was drunk (the appellant admitted he had taken two drinks of vodka); or (2)

23. 231 La. 914, 917, 93 So.2d 214, 216 (1957).
24. 232 La. 546, 94 So.2d 662 (1957).
25. Konen v. New Orleans Police Department, 226 La. 739, 741, 77 So.2d 24, 27 (1954).
26. 232 La. 546, 548, 94 So.2d 662, 665 (1957).
27. 232 La. 926, 95 So.2d 607 (1957).

that he appeared drunk because of a blow in the face (he had admittedly received the blow while attempting to apprehend suspected criminals while off duty). The court noted that it had "repeatedly stated that the ruling of the Commission upholding the dismissal of an employee would not be disturbed where there was some evidence before such body to support its decision" and that "this Court is without authority to examine into the question of the weight or the sufficiency of the evidence to establish intoxication."

Does the court mean by this that it will never disturb findings of fact if there is *some* evidence to sustain the finding? Or does it mean that it will not disturb such findings if reasonable men can differ as to the inferences to be drawn from the established facts? If one again reverts to the opinion in *Day v. Department of Institutions*,[28] it would seem the latter, since there was *some* evidence to support the inference there that plaintiff Day was not terminating a leave of absence when she appeared at the Director's office, there being evidence of a prior oral resignation;[29] presumably the court substituted its judgment in the *Day* case because any inference except that of "termination of leave" was arbitrary, i.e., reasonable men would not differ on such an inference being the only one to be drawn.[30]

In *Marchiafava v. Baton Rouge Fire and Police Service Board*[31] the court reversed a district court for exceeding the statutory scope of its review and for substituting its judgment for that of the Board with respect to the penalty to be imposed for engaging in political activity. The political activity, although minor in character, was clearly established; on the basis of a finding of such activity the Board thought itself required to remove permanently the employee from the service. Under a statute limiting judicial review to the issue of whether the Board made its decison in good faith, the district court nonetheless deemed itself free, on review, to order modification of the removal penalty to some lesser penalty on the ground that the political activity proved was not "just cause" for the penalty of removal. The Supreme Court construed the statute and was per-

28. 231 La. 775, 93 So.2d 1 (1957).
29. *Id.* at 777, 93 So.2d at 4.
30. This would usually be the basis for judicially overturning an administrative finding of fact under the substantial evidence rule as applied in the federal courts. See Comment, *Substantial Evidence on the Record Considered as a Whole*, 12 LOUISIANA LAW REVIEW 290, 298 (1952).
31. 96 So.2d 26 (La. 1957).

suaded that the dismissal was required by the statute, political activity having been established. However, it held the district court must be reversed in any event since lack of good faith had not been established and this issue was the only one open to it.[32]

In *State* ex rel. *Magnolia Park, Inc. v. Louisiana State Racing Commission*,[33] there was drawn in question the rule-making powers of the Commission as well as the validity of action taken under its licensing powers. The statute providing for legalized horse racing, after vesting specific duties in the Commission, further authorizes the Commission "to make rules and regulations for the holding, conducting, and operating of all race tracks, race meets, and races held in Louisiana, provided such regulations are uniform in their application and effect."[34] Under this provision, the Commission formulated its Rule 22K, pursuant to which thoroughbred racing was authorized in the daytime and standardbred harness racing in the nighttime.[35]

Faced with two applications for night thoroughbred racing, one of which was later sought to be amended into an application for day racing, the Commission rejected one application both as an application for night racing as well as day racing and granted the other application for night thoroughbred racing. Rule 22K, providing for only harness racing at night, was not formally repealed prior to this action; the question was thus squarely posed as to the power of the Commission to modify its rules in the course of passing on applications. For a majority of the court the answer was clear: "when the Commission took action contrary to the rule, it simply rendered the rule, which could have been repealed *at any time* no longer operative."[36] (Emphasis added.) There was dissent from this holding, as well there might be, since the rule-making (and unmaking) process is thus stripped of any safeguards except those which the Commission itself may choose to surround it with. It is apropos to note that under the Federal Administrative Procedure Act there would have been required a notice of rule-making to interested parties and an opportunity required to be afforded such parties to submit views unless the agency found (and incorporated

32. *Id.* at 29.
33. 231 La. 720, 92 So.2d 699 (1957).
34. LA. R.S. 4:147(6) (1950).
35. Louisiana State Racing Commission Rules, Rule 22K.
36. 231 La. 720, 731, 92 So.2d 699, 703 (1957).

such finding and its basis in the rules issued) that such procedures were impracticable, unnecessary, or contrary to the public interest.[37] This federal provision obviously contains at least the minimum requirement that a federal agency must make a considered decision as to whether public or *ad hoc* rule-making shall be utilized and must publicly justify that decision. The Model State Administrative Procedure Act provides that "prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall as far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing."[38]

Having decided that the agency had the power to change its rules *ad hoc*, the court further found there was nothing in the record "to indicate that they did not act in accordance with what they thought was the best interest of the public in granting one application and denying another," noting that "where a discretion is vested in an adminstrative board, courts cannot substitute their judgment for that of an administrative body." One member of the court, in dissent, found nothing in the statute granting rule-making power in connection with licensing; even if granted, he would have found the statute unconstitutional as containing no standards for guiding the agency in making rules pursuant to granting and denying licenses. The majority found such rule-making power and also found the limiting standard of the "public interest" was impliedly contained in the act. The dissenting member of the court would also have found a gross abuse of discretion on the part of the Commission both with respect to its interpretation of the statute and its findings of fact thereunder.

Local Government

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IMPLIED LIMITATIONS ON MUNICIPAL AUTHORITY

Even a municipal ordinance clearly within the power conferred upon the municipality by its charter may be invalid if the ordinance is contrary to a state statutory provision or if the

37. 5 U.S.C. § 1003 (1952).

38. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 329, 330, § 2(3) (1944).